

What Is Past Is Prologue: Security Concerns During the Evolution of International Refugee Law

by Alicia Triche



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Refugees from Syria are currently making headlines, but as time goes by there is always some scare-mongering label du jour. Before “terrorist,” there was “communist;” before “communist,” there was “Nazi.” From the start, refugees have been caught in this net—susceptible to the most dangerous descriptions of the time. In February 1950, the United Nations Ad-Hoc Committee on Statelessness and Related Problems was engaged in early drafting of the Refugee Convention. Sir Leslie Brass, the UK representative, “recalled the critical days of May and June 1940, when the United Kingdom had found itself in a most hazardous position; any of the refugees within its borders might have been fifth columnists, masquerading as refugees, and it could not afford to take chances with them.”¹

The UK eventually co-sponsored the amendment to nonrefoulement protection that became Article 33(2) of the existing convention. It excludes from protection “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is” located.² The earliest of similar provisions well pre-date the Refugee Convention. They harken back to the earliest development of International Refugee Law, which was born in 20th century Europe during the interwar era. From even that early beginning, nonrefoulement came at a price. Early advocates such as Navailles and Rubinstein envisioned that there would be no exceptions to the right of nonreturn and perhaps not even to nonexpulsion.³ Still, from the start, state actors were unwilling to accept either without a substantial escape hatch. It was at their insistence that refugee protection emerged side by side with state protection.

Expulsion on grounds of “national security and public order” became nonrefoulement’s other half and the direct lineage to its national security exception.⁴ The phrase continued to appear in later interwar instruments, and, after a lapse during World War II, it continued on a direct path toward Articles 9, 32 and

33 of the Refugee Convention. Two of the most important developments occurred in the 1928 and 1933 League of Nations conventions.

In 1928, the League of Nations held a conference in Geneva, where “for the first time there was a comprehensive consideration of all aspects of the legal status of the refugees.”⁵ It resulted in the first legal statement purporting to limit states’ expulsion activities. Article 7 of the 1928 Arrangement Relating to the Legal Status of Russian and Armenian Refugees⁶ provided:

It is recommended that measures for expelling foreigners or for taking other such action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner. This recommendation does not apply in the case of a refugee who enters a country in intentional violation of the national law. It is also recommended that in no case should the identity papers of such refugees be withdrawn.

This article is the earliest direct root of both nonrefoulement and its exceptions. Characteristic of the time, security (then called defense) is not directly mentioned; instead, it is affirmed that the state has a right to expel anyone who has entered without permission.

By 1933, states with an interest in addressing refugee flow had, for the first time, designated non-refoulement as a legal obligation. The Convention Relating to the International Status of Refugees⁷ contained at Article 3 the first multilateral nonrefoulement obligation, including an agreement not to remove, expel, or subject refugees to “police measures.” There was an exception, however—expulsion or police measures could be utilized if “said measures [were] dictated by reasons of national security or public order.” Article 3

provided the general right to *nonrefoulement*, also with a security exception:

Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (*refoulement*), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.

Both of these multilateral instruments were negotiated during a profound historical era where, as now, the fear of incoming refugees was at a fever pitch. The initial development of *nonrefoulement* was sparked by the magnitude of the “refugee problem,”⁸ which during the interwar period emerged on a scale that was unprecedented. “In

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1918 huge masses of refugees appeared in Europe, victims of new-style nation-states—especially those consolidating their precarious existence in the postwar world.”⁹ These refugees drew international attention “because they numbered millions, not thousands.”¹⁰ Vast in scope and varied in origin, they “sought safety in every country in Europe, and in many other countries around the world.”¹¹ Their numbers exacerbated the problems already emerging as a result of the Great War, which had caused tremendous political, economic, and social problems for the states receiving the bulk of refugee flows.¹² Serving as a UN research officer, Louise Holborn recounted that “the scale of the problem ... was magnified by the fact that Europe was drained by war; stirred by political tensions; and exhausted of capacities to provide adequate relief.”¹³ All of this made states reluctant to grant refugees legal rights.¹⁴

For refugees, then, the reticence to grant rights is as old as the rights themselves. In present times, that reticence is reflected in the post-9/11 fear of terrorism, as well as the modern era of “national security.” In 2007, migration scholar Catherine Dauvergne noted: “The othering at the center of security politics is linked directly to migration laws, and to the desire to crack down, to hermetically seal borders against all possible attack, passage, or infiltration.”¹⁵ She continues with a warning: “Hermetically sealing prosperous nations would end our ‘way of life,’ that central value that is under threat.”¹⁶ Protection of bona fide refugees is also a central value; a moral touchstone for modern civilization. As seen above, that protection was born during a security crisis. Hopefully, it will remain durable through the latest one.

Endnotes

¹UN ECOSOC, “Ad Hoc Committee on Statelessness and Related Problems, First Session, Summary Record of the Twenty-First Meeting,” UN Doc. E/AC.32/SR.21 (Feb. 9, 1950) [33] (Statement of Sir Brass of the United Kingdom, Feb. 2, 1950).

²United Nations Convention Relating to the Status of Refugees (adopted July 28, 1951, entered into force Apr. 22, 1954) 189 UNTS 150 [CSR or Refugee Convention].

³See, e.g., Claudena Skran, “Historical Development of International Refugee Law” in Andreas Zimmermann (ed), *THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* (2011) 3, 14–18. Louis Henkin and the members of the second Ad Hoc Committee also advocated for a right without exceptions; undoubtedly many modern advocates also share this view.

⁴Skran dates the “national security” exception to asylum all the way back to the time of Grotius and Vattel. Skran, *supra* note 3 at 69–70 citing Hugo Grotius, *De Jure Belli Ac Pacis Libere Tres* (tr Francis W Kelsey) 253–54; Clarendon Press Oxford, 1925)); Emer de Vattel, *Le Droit Des Gens, Ou Principes de Law Loi Naturelle Appliqués à la Conduite et Aux Affaires des Nations et des Souverains* 210–11 (Slatkine Reprints Geneva 1983).

⁵Louise W. Holborn, *The Legal Status of Political Refugees*, 32 AMER. J. INTL. L. 4, 680, 687 (1920–1938).

⁶(signed June 30, 1928) (1929) 89 (LXXXIX) LNTS 55 (No 2005), reprinted at (2003) 22 REFUGEE SURVEY Q. 1, 90. This citation is to the English translation conducted by the Secretariat of the League; the official version is in French. *Id.* at 55.

⁷Adopted 28 Oct 1933, entered into force June 13, 1935; 159 LNTS 3663.

⁸This was a phrase commonly used during the period. See, e.g., Jacques L. Rubinstein, *The Refugee Problem*, 15 INT’L AFFAIRS 5, 716, 721 (1936).

⁹Micheal R. Marrus, *THE UNWANTED: EUROPEAN REFUGEES FROM THE FIRST WORLD WAR THROUGH THE COLD WAR* 51 (2d Ed 2002).

¹⁰Claudena Skran, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* 13 (1995).

¹¹*Id.* at 14.

¹²See, e.g., Holborn, *supra* note 5 at 681.

¹³Alessandra Roversi, *The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period*, 22 REFUGEE SURVEY Q. 1, 23. At the time of publication Roversi was an officer with the United Nations International Migration Policy Programme. *Id.* at n. 1.

¹⁴See, e.g., Holborn, *supra* note 5 at 681.

¹⁵Catherine Dauvergne, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* (2007) 102.

¹⁶*Id.* at 102.

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